

# RECENT SIGNIFICANT DECISIONS

## Whistleblower Cases



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Office of Administrative Law Judges  
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## NUCLEAR AND ENVIRONMENTAL WHISTLEBLOWER DECISIONS

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### III. Time limits on filing

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[Nuclear & Environmental Digest III B 2]

#### TIMELINESS OF COMPLAINT; CLAIM ACCRUAL AND DISCOVERY RULE

In whistleblower cases, statutes of limitation run from the date an employee receives final, definitive and unequivocal notice of an adverse employment decision. The date that an employer communicates a decision to implement such a decision, rather than the date the consequences of the decision are felt, marks the occurrence of a violation. Claim accrual is the date a statute of limitations begins to run, *i.e.*, the date a complainant discovers he or she has been injured. Accrual may differ from the date the respondent decides to inflict injury which may pre-date a

complainant's discovery of the injury. The ARB applies a discovery rule in whistleblower cases: limitations periods begin to run on the date when facts which would support a discrimination complaint were apparent or should have been apparent to a person similarly situated to the complainant with a reasonably prudent regard for his or her rights. ***Overall v. Tennessee Valley Authority***, ARB No. 98-111, ALJ No. 1997-ERA-53 (ARB Apr. 30, 2001).

[Nuclear & Environmental Digest III B 3]

TIMELINESS OF FILING OF COMPLAINT; LACK OF EVIDENCE OF MAILING TO ANY GOVERNMENT AGENCY

In ***Roberts v. Battelle Memorial Institute***, ARB No. 00-015, ALJ No. 1996-ERA-24 (ARB Apr. 30, 2001), Wage and Hour, the presiding ALJ, and the ARB all found that Complainant (who was proceeding *pro se*) had not made a timely filing of her ERA complaint. During the ARB appeal, however, Complainant asserted that she made a timely filing with OFCCP that raised cognizable claims under the ERA. She did not produce the purported filing, however. Thus, the ARB affirmed the ALJ. On review before the Sixth Circuit, Complainant produced a document that she alleged was the purported filing; the Sixth Circuit remanded for further fact finding. On remand, the ALJ contacted both OFCCP and the EEOC (to which the OFCCP had forwarded the filing), and each office forwarded copies of the material they had on file relating to the Complainant's filings at the relevant time. The ALJ also conducted a hearing at which Complainant testified and presented a copy of the complaint she alleged she filed and which allegedly contained cognizable ERA complaints. The complaint Complainant presented did not match the documentation found in the OFCCP and EEOC files, which only presented a sex discrimination complaint. Reciting the history of the case, including the repeated attempts during the first proceeding to get Complainant to present anything that would have shown the filing of a timely complaint, and reasoning that the evidence indicating that no government office appeared to have received a timely complaint letter raising ERA issues indicated that no such letter was ever mailed, the ALJ found that Complainant's testimony about the mailing was not credible and recommended dismissal of the complaint. The ARB adopted the ALJ's decision.

[Nuclear & Environmental Digest III B 3]

TIMELINESS OF FILING OF COMPLAINT; RELEVANT ACT IS MAILING, NOT RECEIPT

Pursuant to 29 C.F.R. § 24.3(b) the relevant question on timely filing of a complaint is whether the complaint was actually mailed, rather than actually received. ***Roberts v. Battelle Memorial Institute***, ARB No. 00-015, ALJ No. 1996-ERA-24 (ARB Apr. 30, 2001) (ALJ erred in analogizing to Federal Tort Claims Act that there must be actual receipt of a complaint).

[Nuclear & Environmental Digest III C 1]

## TIMELINESS OF FILING; CONTINUING VIOLATION

In *Overall v. Tennessee Valley Authority*, ARB No. 98-111, ALJ No. 1997-ERA-53 (ARB Apr. 30, 2001), the ARB applied continuing violation theory to find that a timely filing, where Respondent had engaged in an unlawful coverup of a safety problem, which, insofar as it related to Complainant particularly, resulted in a series of retaliatory actions taken by Respondent in furtherance of the coverup. Complainant made a timely filing in regard to his eventual layoff, and therefore, under continuing violation theory, a timely filing was deemed to have been made as to all retaliatory actions by Respondent.

[Nuclear & Environmental Digest III C 1]

## TIMELINESS OF FILING; CONTINUING VIOLATION; POST-HEARING DISCOVERY

In *Foley v. Boston Edison Co.*, ARB No. 99-022, ALJ No. 1997-ERA-56 (ARB Jan. 31, 2001), Complainant argued that his complaint should be considered timely under the continuing violation theory because when during post-hearing discovery Complainant attempted to obtain an investigative file, Respondent objected on relevancy grounds; the ALJ issued a protective order to which Complainant agreed to abide; Respondent subsequently proffered an agreement adopting the non-disclosure language of the protective order. Complainant alleged that the proffer of the agreement constituted the last in a series of retaliatory actions that would render his complaint timely. The ARB agreed with the ALJ that the proffer of the agreement was an unrelated discrete act, and could not be viewed as part of a continuing violation.

## IV. Equitable tolling of filing period

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[Nuclear & Environmental Digest IV B 1]

## TIMELINESS OF COMPLAINT; EQUITABLE MODIFICATION; CONCEALMENT OF OPERATIVE FACT FORMING BASIS OF CAUSE OF ACTION

In *Overall v. Tennessee Valley Authority*, ARB No. 98-111, ALJ No. 1997-ERA-53 (ARB Apr. 30, 2001), the ARB applied equitable modification of the ERA limitations period for filing a complaint, finding that Respondent had concealed an operative fact that formed the basis of the cause of action. The ARB made a distinction between *equitable estoppel* and *equitable tolling*:

The first doctrine is *equitable estoppel*, sometimes denominated fraudulent concealment, which operates when a respondent has acted affirmatively to prevent a complainant from suing in time, for example by promising not to plead the

limitations defense or by presenting fabricated evidence to negate any basis for a claim. Equitable estoppel "presupposes that the plaintiff has discovered, or, as required by the discovery rule, should have discovered, that the defendant injured him, and denotes efforts by the defendant -- beyond the wrongdoing upon which the claim is grounded -- to prevent the plaintiff from filing a timely complaint." *Cada v. Baxter Healthcare Corp.*, 920 F.2d at 451. At least one federal circuit has articulated the burden of proof assumed by the party invoking the doctrine as follows: "(1) wrongful concealment of their actions by the defendants; (2) failure of the plaintiff to discover the operative facts that are the basis of the cause of action within the limitations period; and (3) plaintiff's due diligence until discovery of the facts." *Hill v. U.S. Dep't of Labor*, 65 F.3d at 1335, *quoting Dayco Corp. v. Goodyear Tire & Rubber Co.*, 523 F.2d 389, 394 (6th Cir. 1975). Application of the doctrine of equitable estoppel subtracts from the limitations period the entire period during which the modifying condition is extant so as to prevent a respondent from benefitting as the result of its concealment. *Cada v. Baxter Healthcare Corp.*, 920 F.2d at 452.

The second doctrine arguably germane is *equitable tolling*. It applies where a complainant, despite due diligence, is unable to secure information supporting the existence of a claim. Unlike equitable estoppel it does not assume any effort by a respondent to prevent the complainant from suing. The complainant knows that he has suffered an injury but is unable to ascertain whether that injury is due to wrongdoing or, if cognizant of wrongdoing, whether the respondent perpetrated the wrongdoing. An employer, for example, may discharge an employee who is protected under laws prohibiting age discrimination and replace him several months later with a young and inexperienced employee. The discharged employee knows that he has suffered injury inflicted by his employer but is unaware of possible wrongdoing until he discovers the fact and identity of his replacement which would suggest that age may have motivated the discharge. The doctrine of equitable tolling suspends the running of the statute of limitations only until such time as is reasonably necessary to conduct an inquiry to ascertain the existence of a claim.

Slip op. at 42-43 (footnote omitted). The ARB held that Respondent in the instant case concealed operative facts forming the basis of a cause of action when it offered Complainant what he believed to be a secure position but concealed funding limitations for the new division. The ARB found that equitable estoppel tolled the period from the date Complainant applied for the "permanent" position to avoid an at-risk transfer until he was notified of layoff from the "permanent" position.

[Nuclear & Environmental Digest IV C 4]

## TIMELINESS OF FILING; ARGUMENT THAT NRC FAILED TO INVESTIGATE PROMPTLY AND INFORM COMPLAINANT OF DOL COMPLAINT PROCEDURE

In *Foley v. Boston Edison Co.*, ARB No. 99-022, ALJ No. 1997-ERA-56 (ARB Jan. 31, 2001), Complainant argued that he had informed the NRC of his safety concerns in 1995 and, that if the NRC had conducted a prompt investigation, it might have assisted him in filing a timely complaint with DOL. The ARB held that absent a showing that the NRC's actions somehow prevented Complainant from exercising his right to file a complaint, it would not equitably toll the limitations period.

[Nuclear & Environmental Digest IV C 9]

## TIMELINESS OF FILING; INCAPACITY

Where Complainant made a bald assertion that a medical condition prevented him from making a timely filing of his whistleblower complaint, the ARB declined to equitably toll the limitations period. The ARB noted that although Complainant submitted letters showing that he was under a doctor's care, his doctor does not state or even suggest the illness was so debilitating that it prevented Complainant from either understanding his legal rights or acting upon them. *Foley v. Boston Edison Co.*, ARB No. 99-022, ALJ No. 1997-ERA-56 (ARB Jan. 31, 2001).

## V. OSHA/Wage and Hour Division investigation

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[Nuclear & Environmental Digest V C 2]

## TIMELINESS OF OSHA INVESTIGATIONS

On March 16, 2001, the U.S. Department of Labor Office of Inspector General issued a report, **"Evaluation of OSHA's ERA and EPA Whistleblower Investigations," Report No. 2E-10-105-0001** (Mar. 16, 2001), which focused on the 30-day statutory time frame for conducting investigations. OIG found that OSHA was not meeting the 30-day time frame, and made a series of recommendations on how OSHA could reduce the amount of time it takes to conduct investigations. OSHA agreed with the OIG findings and recommendations, and implemented or presented plans for implementing the OIG recommendations.

## VI. Request for hearing

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[Nuclear & Environmental Digest VI E]

## TIMELINESS OF REQUEST FOR HEARING; CLERICAL ERROR IN ATTORNEY'S OFFICE

In *Howlett v. Northeast Utilities*, ARB No. 99-044, ALJ No. 1999-ERA-1 (ARB Mar. 13, 2001), a request for a hearing was not filed until sixty-nine business days after the OSHA determination. In the letter requesting the hearing, counsel stated that, because a newly-hired employee misfiled the determination letter, he did not see it until two days earlier. Counsel argued that, because the delay was the result of a clerical error, the ALJ should have tolled the five-day filing requirement. The ALJ did not find this excuse sufficient to justify equitable tolling and recommended that the complaint be dismissed. The ARB affirmed. One Board member dissented based on the equities of case, especially given that in whistleblower cases the public interest is involved. The majority stated that it agreed with the general proposition of the dissent that the Board has the authority to relax or modify procedural rules to promote justice, but found that the facts of the instant case did not warrant a waiver of the time limitation.

[Nuclear & Environmental Digest VI E]

## TIME LIMIT FOR REQUESTING HEARING SUBJECT TO EQUITABLE TOLLING

The time limit for filing a request for hearing is not a jurisdictional prerequisite, and is subject to the principles of equitable tolling. Where Respondents filed a request for hearing with the Administrator, but not the Office of the Chief Administrative Law Judge as required by the applicable regulation, but there was no showing of delay that hampered Complainant in litigating her case on the merits (all parties proceeded on the assumption that the request had been filed with the Chief Judge and it was only later that anyone discovered the defect), the ARB agreed with the ALJ that equitable tolling was appropriate. *Shelton v. Oak Ridge National Laboratories*, ARB No. 98-100, ALJ No. 1995-CAA-19 (ARB Mar. 30, 2001).

## VII. Proceedings before OALJ

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[Nuclear & Environmental Digest VII A 2]

## DISCOVERY; UNDULY BURDENSOME REQUEST FOR E-MAIL

In *Williams v. Lockheed Martin Energy Systems, Inc.*, ARB No. 98-059, ALJ No. 1995-CAA-10 (ARB Jan. 31, 2001), it was not an abuse of discretion for the ALJ to limit discovery on e-mail systems to those which related to Complainant's complaint.

[Nuclear & Environmental Digest VII A 2]

## DISCOVERY; LIMITATIONS ON SCOPE

In *Hasan v. Burns & Roe Enterprises, Inc.*, ARB No. 00-080, ALJ No. 2000-ERA-6 (ARB Jan. 30, 2001), a refusal to hire case, Complainant argued that the ALJ improperly limited discovery by not requiring Respondent to produce a list containing name, qualifications and experience of every civil/structural engineer it employs, regardless of location. The Board wrote:

Under the Secretary's Rules of Practice and Procedure, a party may obtain discovery only for "relevant" information and an ALJ may, upon motion of a party, "make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including [a ruling that] . . . [c]ertain matters not relevant may not be inquired into or that the scope of discovery be limited to certain matters." 29 C.F.R. §§18.14(a) and 18.15(a) (2000). The Secretary's Rules also state "[t]he Rules of Civil Procedure for the District Courts of the United States shall be applied in any situation not provided for or controlled by these rules, or by any statute, executive order or regulation." 29 C.F.R. §18.1(a).

The Secretary's Rules governing the scope of discovery are substantially the same as those of Fed. R. Civ. P. 26. In *Herbert v. Lando*, 441 U.S. 153 (1979), the Supreme Court noted that Fed. R. Civ. P. 26 gives district judges ample authority to prevent abuse of the discovery process and encouraged judges to use that authority when necessary. Specifically, the Court stated:

The Court has more than once declared that the deposition-discovery rules are to be accorded a broad and liberal treatment to effect their purpose of adequately informing litigants in civil trials . . . . But the discovery provisions, like all of the Federal Rules of Civil Procedure, are subject to the injunction of Rule 1 that they "be construed to secure the just, speedy, and inexpensive determination of every action." (Emphasis added.) To this end, the requirement of Rule 26(b)(1) that the material sought in discovery be "relevant" should be firmly applied, and the district courts should not neglect their power to restrict discovery where "justice requires [protection for] a party or person from annoyance, embarrassment, oppression, or undue burden or expense . . . ." Rule 26(c). With this authority at hand, judges should not hesitate to exercise appropriate control over the discovery process.

The ARB held that under the circumstances – the hiring decision was made in corporate

headquarters and Complainant had not shown that such decisions were being made elsewhere – the ALJ acted within the scope of his authority in limiting discovery.

[Nuclear & Environmental Digest VII A 6]

DISCOVERY; DOL DOES NOT HAVE JURISDICTION TO ORDER OTHER AGENCIES TO COMPLY WITH FOIA REQUESTS

In *Williams v. Lockheed Martin Energy Systems, Inc.*, ARB No. 98-059, ALJ No. 1995-CAA-10 (ARB Jan. 31, 2001), the ALJ denied Complainant's motion to order the Department of Energy to comply with his FOIA request. The ARB held that this was a correct ruling by the ALJ as "the Department of Labor does not have jurisdiction to rule on DOE FOIA matters."

[Nuclear & Environmental Digest VII C 1]

SUMMARY DECISION; COMPLAINANT'S OWN AFFIDAVIT BASED ON NAKED SPECULATION INSUFFICIENT TO OVERCOME RESPONDENT'S MOTION FOR SUMMARY DECISION SUPPORTED BY AFFIDAVIT

In *Hasan v. Burns & Roe Enterprises, Inc.*, ARB No. 00-080, ALJ No. 2000-ERA-6 (ARB Jan. 30, 2001), Complainant responded to Respondent's motion for summary decision -- which was supported by the affidavit of the hiring official averring that he did not know about Complainant's whistleblowing activity prior to making the decision not to hire – with his own affidavit, which contained his speculation as to the reasons he was not hired. Complainant argued that at the summary judgment stage, the ALJ was required to accept the statements in his affidavit as true. The ARB found that to defeat a motion for summary judgment the non-moving party must do so through some means other than mere speculation or conjecture.

[Nuclear & Environmental Digest VII C 3]

MOTION FOR SUMMARY JUDGMENT; "FACTUAL" 12(b)(1) MOTION

In *Williams v. Lockheed Martin Energy Systems, Inc.*, ARB No. 98-059, ALJ No. 1995-CAA-10 (ARB Jan. 31, 2001), the ARB affirmed the ALJ's dismissal under Fed. R. Civ. P. 12(b)(1) where Respondent Department of Energy presented affidavits and a contract in support of its motion to dismiss on theory that it did not have an employer-employee relationship with Complainant, and Complainant failed to support his position with documents or affidavits. The Board made it clear that this was not a ruling that DOE is not a covered employer, but only that Complainant failed to support its claim that DOE was a "joint employer" when presented with the affidavit/document based on a 12 (b)(1) motion.

## VIII. Powers, responsibilities and jurisdiction of ALJ, Secretary and federal courts

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[Nuclear & Environmental Digest VIII A 5]

### ALJ BIAS; PRESUMPTION OF HONESTY AND INTEGRITY

In *Cox v. Lockheed Martin Energy Systems, Inc.*, ARB No. 99-040, ALJ No. 1997-ERA-17 (ARB Mar. 30, 2001), Complainants asserted that the ALJ was biased against them. The ARB held that the Complainants could not "prevail on such a claim of bias unless they can first overcome a presumption of honesty and integrity that accompanies administrative adjudicators. See *Withrow v. Larkin*, 421 U.S. 35, 47 (1975); *Ash Grove Cement Co. v. FTC*, 577 F.2d 1368, 1376 (9th Cir. 1978), *cert. denied* 439 U.S. 982; *High v. Lockheed Martin Energy Sys., Inc.*, ARB No. 98-075, ALJ No. 96-CAA-8 (ARB Mar. 13, 2001)." In the instant case, the ARB found that Complainants had alleged no more than a dissatisfaction with the ALJ's attitude and the manner in which he conducted the proceedings -- allegations which standing alone are insufficient to establish bias.

To the same effect: *High v. Lockheed Martin Energy Systems, Inc.*, ARB No. 98-075, ALJ No. 1996-CAA-8 (ARB Mar. 13, 2001) (even if ALJ became angry when confronted with an allegation of bias, a momentary loss of judicial temperament, standing alone, is insufficient to overcome presumption of honesty and integrity).

[Nuclear & Environmental Digest VIII A 8]

### FINDINGS OF FACT AND CONCLUSIONS OF LAW; NUMBERING OF PARAGRAPHS

In *Cox v. Lockheed Martin Energy Systems, Inc.*, ARB No. 99-040, ALJ No. 1997-ERA-17 (ARB Mar. 30, 2001), Complainants filed a number of objections to the ALJ's recommended decision, including a complaint that the ALJ had "fail[ed] to organize any of his conclusions by paragraph numbers." The ARB found that this objection was without merit and did not warrant discussion.

[Nuclear & Environmental Digest VIII B 1 d]

### ENFORCEMENT OF SECRETARY'S ORDER

In *McCollum v. University of Oklahoma College of Pharmacy*, 2001-ERA-11 (ALJ Apr. 5, 2001), Complainant sought enforcement of a final Secretary's Order on the ground, *inter alia*, that Respondent did not reinstate him to his prior position or provide back pay. The ALJ held

that jurisdiction over enforcement of a Secretary's Order does not lie with the Office of Administrative Law Judges, but rather with the United States District Court in the district in which the violation occurred. *See* 42 U.S.C. §§ 5851(d), 5851(e).

[Nuclear & Environmental Digest VIII B 1 d]

#### SOVEREIGN IMMUNITY; ARB RAISES ISSUE *SUA SPONTE*

In ***Pastor v. Veterans Affairs Medical Center***, ARB No. 99-071, 1999-ERA-11 (ARB Mar. 1, 2001), the case was before the ARB based on the ALJ's recommendation of dismissal based on Complainant's failure to file a timely complaint. In an Order Directing Additional Briefing, the ARB noted that Respondent is an agency of the federal government, and that sovereign immunity has not been waived under the ERA whistleblower provision. Even though Respondent had not raised the issue, the ARB found that sovereign immunity is jurisdictional in nature, and therefore appropriate for the ARB to raise *sua sponte*. Thus, the ARB ordered the parties to brief the issue.

[Nuclear & Environmental Digest VIII B 2 a]

#### REVIEW OF DEMEANOR-BASED CREDIBILITY DETERMINATIONS OF ALJ

The ARB reviews ALJ decisions under the ERA *de novo*, but accords special weight to an ALJ's demeanor-based credibility determinations. ***Phillips v. Stanley Smith Security, Inc.***, ARB No. 98-020, ALJ No. 1996-ERA-30 (ARB Jan. 31, 2001).

[Nuclear & Environmental Digest VIII B 2 b]

#### REOPENING RECORD BEFORE THE ARB

When considering a motion to reopen to submit new evidence, the ARB relies on the same standard as found in the OALJ Rules of Practice at 29 C.F.R. § 18.54(c). ***Williams v. Lockheed Martin Energy Systems, Inc.***, ARB No. 98-059, ALJ No. 1995-CAA-10 (ARB Jan. 31, 2001).

[Nuclear & Environmental Digest VIII B 2 b]

#### REOPENING RECORD; NEW AND MATERIAL EVIDENCE

In ***Overall v. Tennessee Valley Authority***, ARB Nos. 98-111, 98-128, ALJ No. 1997-ERA-53 (ARB Apr. 30, 2001), evidence of recent NRC findings that aided in understanding Complainant's protected activity was submitted under joint motion. The ARB found that it was new and material evidence that was not readily available prior to the close of the record before

the ALJ, and therefore granted the motion to receive the NRC findings into the record. *See* 29 C.F.R. § 18.54(c) (2000).

[Nuclear & Environmental Digest VIII B 2 b]

#### REMAND; NEW EVIDENCE BEARING ON COMPLAINANT'S CREDIBILITY

In *Overall v. Tennessee Valley Authority*, ARB Nos. 98-111, 98-128, ALJ No. 1997-ERA-53 (ARB Apr. 30, 2001), Respondent moved for a remand to the ALJ to develop the record to determine whether evidence generated by TVA during an investigation after the close of the ALJ hearing had a bearing on Complainant's credibility. The ARB denied the motion because the parties had abundant opportunity to conduct discovery prior to the hearing.

[Nuclear & Environmental Digest VIII B 2 b]

#### REOPENING THE RECORD; "MATERIAL" MEANS SUFFICIENT WEIGHT TO WARRANT DIFFERENT OUTCOME

In *Foley v. Boston Edison Co.*, ARB No. 99-022, ALJ No. 1997-ERA-56 (ARB Jan. 31, 2001), Complainant requested that the Board reopen the record to admit a letter from the NRC to the DOL regarding a protective order issued by the ALJ. The Board observed that when considering whether to admit new evidence, it will rely on the same standard found in the OALJ Rule of Practice at 29 C.F.R. § 18.54(c), which provides that, once the record is closed, additional evidence shall be accepted only upon a showing that it is new and material and was not readily available prior to the closing of the record. The Board held that it would consider evidence material when it is of sufficient weight to warrant a different outcome. The Board found that the letter had no bearing on the determinative findings of the ALJ, and therefore was immaterial.

[Nuclear & Environmental Digest VIII B 2 c]

#### ARGUMENTS RAISED FIRST ON APPEAL

The ARB generally will not consider arguments that are raised for the first time on appeal. *Foley v. Boston Edison Co.*, ARB No. 99-022, ALJ No. 1997-ERA-56 (ARB Jan. 31, 2001).

[Nuclear & Environmental Digest VIII B 2 c]

#### ISSUES PRESERVED ON APPEAL; POLICY OF APPELLATE RESTRAINT

In *Williams v. Lockheed Martin Energy Systems, Inc.*, ARB No. 98-059, ALJ No.

1995-CAA-10 (ARB Jan. 31, 2001), the ALJ had dismissed two individuals as Respondents, and Complainant did not challenge those dismissals on appeal; one member of the Board, however, criticized the ALJ's dismissal of these individuals. The majority opinion, however, noted that "[i]t is a basic tenet of appellate practice and procedure that the reviewing court will not address rulings of the trial judge that the parties do not challenge on appeal." Although recognizing that the rules of appellate restraint apply differently in administrative adjudications than in Article III courts, the majority nonetheless pointed out that appellate restraint serves the fairness considerations of not depriving parties of the ability to control what or how much they place at risk of reversal, and reserving exceptions to the rule for "extraordinarily important issues, such as jurisdiction or the validity of the law on which the appeal depends."

[Nuclear & Environmental Digest VIII B 2 e]

#### REVIEW OF ALJ PROCEDURAL RULINGS; ABUSE OF DISCRETION STANDARD

The ARB reviews alleged procedural errors by an ALJ under the abuse of discretion standard. *Cox v. Lockheed Martin Energy Systems, Inc.*, ARB No. 99-040, ALJ No. 1997-ERA-17 (ARB Mar. 30, 2001).

### **IX. Miscellaneous procedural issues**

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[Nuclear & Environmental Digest IX B 1]

#### CLEAR ARTICULATION OF CASE BY COMPLAINANT; AUTHORITY OF ALJ TO REQUIRE

When presented with a prolix, rambling complaint, an ALJ has the authority to demand that a complainant come forward with a clear articulation of his or her case. *High v. Lockheed Martin Energy Systems, Inc.*, ARB No. 98-075, ALJ No. 1996-CAA-8 (ARB Mar. 13, 2001) (suggesting, however, that Fed. R. Civ. P. 12(b)(6) may not be the appropriate tool for dealing with an unintelligible complaint).

[Nuclear & Environmental Digest IX B 2]

#### BRIEF BEFORE ARB; SERVICE ON COMPLAINANT BY MAIL WHEN BRIEF FILED WITH BOARD BY FAX NOT DISCRIMINATORY; REBUTTAL TO REPLY BRIEF PERMITTED

In *Slavin v. Pacific Northwest National Laboratory*, ARB No. 00-081, ALJ No. 2000-ERA-26 (ARB Feb. 14, 2001), the ARB denied Complainant's motion to strike Respondent DOE's reply

brief on the ground that it was faxed to the ARB, but sent by regular mail to Complainant, and therefore the service by mail was "invidiously discriminatory." The ARB found that 29 C.F.R. § 24.8 (2000) does not require service by fax or express mail, and that its briefing schedule was predicated on service by regular mail. Complainant, however, was granted permission to file a rebuttal brief in response to DOE's reply brief.

[Nuclear & Environmental Digest IX B 4]

#### *PRO SE* COMPLAINANT; LIBERAL CONSTRUCTION OF PLEADINGS

In *Hasan v. Sargent and Lundy*, ARB No. 01-001, ALJ No. 2000-ERA-7 (ARB Apr. 30, 2001), the ALJ had recommended dismissal based on failure to state a claim for relief, where the ALJ found that Complainant had not specifically alleged that any employee involved in Respondent's hiring practices had knowledge of Complainant's protected activity.

The ARB observed that *pro se* pleadings are to be construed liberally, and that although Complainant's pleadings were inartfully drafted, it had been able to discern the basis of his argument. Although he did not specifically so assert in his response to the ALJ's order to show cause, by examining an attachment to Complainant's response to the ALJ's order to show cause, it could be determined that Respondent had conceded that two employees who had participated in the decision not to hire Complainant had previously discussed safety concerns with Complainant. The ARB thus remanded the case for further proceedings. The ARB noted, however, that liberal construction of a *pro se* complainant's pleadings does not obligate an ALJ to develop arguments on behalf of a complainant.

[Nuclear & Environmental Digest IX C]

#### JOINT LIABILITY OF HOLDING COMPANY NOT JOINED IN LAWSUIT

In *Hobby v. Georgia Power Co.*, ARB No. 98-166, ALJ No. 1990-ERA-30 (ARB Feb. 9, 2001), Complainant argued that the ALJ erred by not making Respondent Georgia Power's parent company, Southern Company (a holding company for a variety of Southeastern U.S. utilities) liable for his reinstatement and monetary relief. The ARB held that the regulation at 29 C.F.R. § 24.6(a)(2) requires the "party charged" to offer reinstatement, and that since only Georgia Power had been charged by Complainant and found by the Secretary to have violated the ERA, it would decline to expand the scope of the proceeding at that late stage in the proceeding by holding the parent company liable for reinstatement and other remedies. The ARB agreed with the ALJ's admonition, however, directed at Southern Company and its subsidiaries that it should avoid future discrimination against Complainant by not offering him the opportunities for movement from one subsidiary to another as the record showed was common practice among those companies.

[Nuclear & Environmental Digest IX K]

STAY; *DE NOVO* REVIEW OF NON-DEMEANOR CREDIBILITY DETERMINATIONS;  
IMPACT OF COMPLAINANT HAVING BEEN A HIGH MANAGEMENT OFFICIAL

In *Hobby v. Georgia Power Co.*, ARB No. 98-166, ALJ No. 1990-ERA-30 (ARB Apr. 20, 2001), Respondent requested that the ARB stay its final decision. The ARB utilized a four-part test to determine whether to grant a stay:

- (1) the likelihood that the party seeking the stay will prevail on the merits of the appeal;

The ARB found that it was not likely that Respondent would prevail on appeal; although Respondent alleged that the Secretary of Labor in a 1995 decision on liability improperly reversed the ALJ on critical credibility determinations, the ARB found that the Secretary's decision had not been based on demeanor-based credibility findings by the ALJ, but rather on different inferences raised from the evidence which is proper based on the Secretary's *de novo* review authority.

- (2) the likelihood that the moving party will be irreparably harmed absent a stay;

The ARB found unpersuasive Respondent's argument that it would suffer irreparable harm if Complainant was reinstated into its management ranks, based on arguments about Complainant's competence and access to confidential and proprietary information. The ARB, noting that Congress plainly contemplated that reinstatement would be effected immediately upon the Secretary's (or ARB's) issuance of a Final Order, found that inconvenience to Respondent was insufficient reason to support a stay, and that a company as large as Respondent should be able to reintegrate Complainant without compromising sensitive matters. The ARB noted that Respondent routinely uses classroom training for managers, and suggested that Complainant's retraining begin immediately.

- (3) the prospect that others will be harmed if the court grants the stay; and

The ARB found that delay in reinstatement could further stigmatize a complainant, and could mean further delay in an award of back pay and other damages.

- (4) the public interest in granting a stay.

The ARB declined to adopt Respondent's theory that senior managers have a different relationship with the employer than lower level personnel, and thus restoration to prior status may not be appropriate. The ARB held that "there is no reason why senior managers should receive less protection under the ERA than workers who occupy lower rungs on the corporate ladder." Slip at 7, citing ARB 2001 Dec. at 10.

[Nuclear & Environmental Digest IX M 2]

#### ATTORNEY CONDUCT; VITRIOLIC ATTACKS ON ALJ

Vitriolic attacks on administrative law judges are inconsistent with a lawyer's ethical obligations, and cannot substitute for sound legal argument. *Cox v. Lockheed Martin Energy Systems, Inc.*, ARB No. 99-040, ALJ No. 1997-ERA-17 (ARB Mar. 30, 2001), citing *Pickett v. TVA*, ARB No. 00-076, ALJ Nos. 99-CAA-25, 00-CAA-9 (ARB Nov. 2, 2000) (order striking brief).

[Nuclear & Environmental Digest IX M 2]

#### LITIGANT CONDUCT; VITUPERATIVE BEHAVIOR

In *Hasan v. Commonwealth Edison Co.*, ARB No. 01-002, ALJ No. 2000-ERA-8 (ARB Apr. 23, 2001), a Respondent moved to strike Complainant's *pro se* brief because it devoted significant text to heaping abuse on DOL, the ALJ, various attorneys, and others. The ARB stated that if the brief had been filed by an attorney, it would not have hesitated to strike it; however, it would allow considerably more leeway to a *pro se* litigant. Thus, the ARB did not strike the brief. The ARB noted, however, that "it is reasonable for a court to demand that all litigants – including *pro se* litigants – comport themselves with a measure of civility and respect for the tribunals that hear their cases. Among *pro se* litigants, this proposition applies particularly to litigants such as [Complainant], who has significant litigation experience. Not only is vituperative behavior by a litigant unwarranted and inappropriate, it ultimately is self-defeating because it detracts from a complainant's ability to make a sound legal argument in support of his case."

### **X. Weighing of evidence and interpretation of law, generally**

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[Nuclear & Environmental Digest X C]

#### EVIDENCE; PROBATIVE VALUE OF ALLEGED BROAD ENVIRONMENTAL CONTAMINATION BY RESPONDENT

In *Cox v. Lockheed Martin Energy Systems, Inc.*, ARB No. 99-040, ALJ No. 1997-ERA-17 (ARB Mar. 30, 2001), Complainants argued that the ALJ erred in refusing to admit into evidence certain documents. The ALJ found that the offered documents were offered late and without good cause; the ARB affirmed on that ground, but went on to observe that the documents had little relevance to the case. The ARB concluded that the documents were offered to attempt to demonstrate a broad conspiracy on the part of Respondent to cover up environmental contamination, but had nothing to do with the circumstances of Complainants' termination from employment. The ARB wrote:

While environmental contamination in general is a matter of significant public concern, the Coxes have chosen an inappropriate vehicle for raising any such broader issues. The Labor Department's jurisdiction under the ERA and the Environmental Acts is to enforce the employee protection provisions of these statutes; the documents cited by the Coxes simply have little bearing on the underlying question in this case, *i.e.*, whether they were chosen for layoff in retaliation for their alleged protected activity.

## **XI. Burden of proof and production**

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[Nuclear & Environmental Digest XI A]

### **BURDEN OF PROOF AND PRODUCTION**

See *Overall v. Tennessee Valley Authority*, ARB No. 98-111, ALJ No. 1997-ERA-53 (ARB Apr. 30, 2001), for a recent overview of the burdens of proof and production in a circumstantial evidence case in ERA whistleblower cases.

[Nuclear & Environmental Digest XI A 2 a]

### **MOTIVATION; RESPONDENT'S PERCEPTION THAT MATTERS, NOT COMPLAINANT'S ACTUAL ACTIONS OR MOTIVES**

In *Phillips v. Stanley Smith Security, Inc.*, ARB No. 98-020, ALJ No. 1996-ERA-30 (ARB Jan. 31, 2001), Complainant maintained that he had an extremely limited conversation with a TV station prior to broadcast of a report on a change in security procedure at a local nuclear power plant. The ARB construed Complainant's argument as being that Respondent erroneously concluded that he had engaged in protected activity by giving information to the TV station regarding details of a restructuring plan and turning over to the TV station an e-mail concerning an FBI security alert. There was conflicting testimony about what Complainant said to the TV station and whether he provided the e-mail to the station – the ALJ concluded that Complainant

was the source of the TV station's information, and the ARB found no reason not to credit the ALJ's determination on this matter. The ARB, however, wrote that it was not important to the analysis whether Complainant gave the information and e-mail to the TV station, nor what motive Complainant may have had in making such disclosures (if, in fact, made by Complainant). Moreover, the ARB found that it was not important whether Complainant's asserted belief that the security restructuring plan would make the nuclear facility vulnerable to attack was a reasonable belief. Rather, it was Respondent's motive for taking action against Complainant that was decisive – the evidence must support a finding that retaliatory motive animated the adverse employment action taken.

The ARB credited Respondent's representations that it terminated Complainant because it believed that: 1) Complainant disclosed security information about the nuclear power plant to unauthorized personnel at the TV station; 2) Complainant did so not because he was concerned about the safety of the facility, but because he would not be eligible to apply for a new tactical response officer (armed guard) position and would therefore be downgraded to an unarmed guard; and 3) Complainant obstructed their investigation into the disclosure and flatly lied about his activities. Thus, the ARB found that Respondent terminated Complainant's employment not because they believed that he had engaged in activity protected by the ERA, but because it believed that he had turned over security information to an unauthorized person to further his own personal interests, and then lied about it.

One member of the Board dissented from the conclusion that Respondent was not motivated by retaliatory animus in terminating Complainant's employment, finding that Complainant's protected activity of contact with the news media was a contributing factor in the termination. The dissent concluded: "Phillips had the right under the ERA to anonymous and unfettered communication of his concerns regarding the security of the guard restructuring plan, which communication under the facts he reasonably believed was in furtherance of the purposes underlying the ERA. Respondent cannot lawfully assert an employment-related obligation on Phillips' part for full disclosure of his role in derogation of this federal right. "

[Nuclear & Environmental Digest XI A 2 a]

CAUSATION; RETALIATORY ANIMUS

In *Thompson v. Houston Lighting & Power Co.*, ARB No. 98-101, ALJ No. 1996-ERA-34 (ARB Mar. 30, 2001), Complainant had settled several earlier whistleblower complaints. He subsequently contacted the NRC with a concern over certain language in the settlement agreement (the NRC in fact found that portions of the agreement were in conflict with NRC regulations and public policy). Thereafter, Complainant requested that he be provided with copies of reports of psychological testing done by physicians hired by Respondent in preparation for the damages stage of the hearing in the earlier cases (because the cases had never gone to

trial, they had not been previously released). Complainant believed that the settlement agreement entitled him to copies of these reports. When Respondent declined to release the reports, Complainant filed a whistleblower complaint alleging that the refusal was in retaliation for his going to the NRC about the settlement.

Complainant argued that the temporal proximity between his contact with the NRC and Respondent's refusal to turn over the records raised an inference of causation, and apparently, that this inference compelled a finding that retaliatory animus was a contributing factor in the refusal to turn over the records. The ARB found, however, that although temporal proximity might provide powerful evidence of retaliatory animus, the ALJ properly found based upon all of the facts presented to him that Respondent was not motivated by retaliatory animus, Respondent believing that, having settled the complaint, it was under no obligation to produce the records, and that the records were subject to the attorney work product privilege. The ARB held that "[t]he ALJ did precisely what was required by the circumstances of this case: he weighed all of the relevant evidence regarding [Respondent's] motivation, including the evidence regarding temporal proximity, and determined that [Complainant] had not proven his case."

[Nuclear & Environmental Digest XI A 2 b ii]

#### TEMPORAL PROXIMITY

In *Overall v. Tennessee Valley Authority*, ARB No. 98-111, ALJ No. 1997-ERA-53 (ARB Apr. 30, 2001), the temporal proximity of the adverse action and Complainant's protected activity, together with other circumstantial evidence was sufficient to support a finding that Respondent engaged in a coverup of safety hazards to facilitate fuel load and start up at its nuclear facility, with the coverup including removal of Complainant from a position where he could continue to raise safety concerns that threatened to delay the start up of the facility.

Compare *Thompson v. Houston Lighting & Power Co.*, ARB No. 98-101, ALJ No. 1996-ERA-34 (ARB Mar. 30, 2001) (temporary proximity only part of the picture; ALJ properly weighs all the evidence in regard to retaliatory animus; in case *sub judice* temporal proximity was not enough to establish such animus).

[Nuclear & Environmental Digest XI C 2 a]

#### CIRCUMSTANTIAL EVIDENCE CASE

In *Overall v. Tennessee Valley Authority*, ARB No. 98-111, ALJ No. 1997-ERA-53 (ARB Apr. 30, 2001), Complainant was a power plant specialist at Respondent's Watt's Bar nuclear facility primarily responsible for the ice condenser system. He raised safety concerns about ice basket

screws that could have substantially delayed the start up of the facility.

Respondent argued before the ARB that the ALJ had constructed a theory of an extensive conspiracy to remove Complainant from his job, which was not supported by the evidence of record, and was based on unwarranted assumptions and speculation. The ARB, however, found that the ALJ correctly applied the *Burdine/St. Mary's Honor Center/Reeves* discrimination model in finding a strong circumstantial evidence case to support a finding that Respondent engaged in a coverup of safety hazards to facilitate fuel load and start up at its nuclear facility, an integral facet of which was to remove Complainant from the ice condenser system at the facility, from employment at the facility, from contact with the ice condenser system, and ultimately from Respondent's employment altogether, because of Complainant's activities to ensure the safety of the ice condenser system.

The decision is too complex to distill adequately in a casenote, but the ARB's analysis focused on the temporal proximity of the adverse action and the protected activity: Complainant had an excellent work history prior to a decision to give him the option of either an "at-risk" transfer or transfer to an ostensibly secure position with an underfunded division only a few months after he raised the screw failure problem with "zeal and competence." A complete investigation of the screw problem potentially could have significantly delayed start up of the plant. The ARB thoroughly reviewed the record and found that each of Respondent's "legitimate" reasons for its actions were refuted by the weight of the evidence; thus the ALJ properly found that the unlawful motivation remained. *See Reeves v. Sanderson Plumbing Products, Inc.*, 120 S.Ct. at 2108-2109 (once employer's justification eliminated, discrimination may well be most likely explanation, especially since employer is in best position to put forth actual reason for its decision).

## **XII. Protected activity**

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[Nuclear & Environmental Digest XII C 4]

PROTECTED ACTIVITY; REASONABLE PERCEPTION; NRC APPROVAL OF FACILITY'S PROCEDURE DOES NOT NECESSARILY RENDER COMPLAINANT'S CONCERNS UNREASONABLE

NRC approval of a security restructuring plan at a nuclear facility does not necessarily render a complainant's raising of security concerns about the plan unreasonable. *Phillips v. Stanley Smith Security, Inc.*, ARB No. 98-020, ALJ No. 1996-ERA-30 (ARB Jan. 31, 2001).

[Nuclear & Environmental Digest XII D 1 a]

PROTECTED ACTIVITY; COMPLAINT ABOUT POOR PHYSICAL CONDITIONING OF

## SECURITY GUARDS AT NUCLEAR FACILITY; ENVIRONMENTAL AND NUCLEAR WHISTLEBLOWER COMPLAINTS

In *High v. Lockheed Martin Energy Systems, Inc.*, ARB No. 98-075, ALJ No. 1996-CAA-8 (ARB Mar. 13, 2001), Complainant, a Physical Training Coordinator, complained to his employer about the failure of some security guards at the Oak Ridge Operations Office fully to participate in the exercise program required by DOE regulations. In dismissing the complaint under Fed. R. Civ. P. 12(b)(6) -- failure to state a claim upon which relief can be granted -- as to the environmental whistleblower provisions, the ARB wrote:

Neither the environmental acts nor their implementing regulations have any provisions that govern the physical conditioning of security guards; thus on its face, High's complaint under the environmental acts does not point to a specific statutory or regulatory provision allegedly violated by any of the respondents. High attempts to bootstrap his complaint into a protected activity by asserting that (1) unfit guards will be unable to deter the theft of nuclear material; (2) this nuclear material could find its way into a nuclear bomb; (3) the nuclear bomb may be detonated in this country; and (4) the resulting explosion would be harmful to the environment. .... Because High has offered nothing other than speculation, which we have found insufficient as a matter of law to constitute protected activity, his concerns are not protected under the environmental acts.

The ARB, however, found that the complaint could survive a Fed. R. Civ. P. 12(b)(6) motion under the *ERA* whistleblower provision, because the physical fitness program at DOE's Oak Ridge facility is mandated by DOE regulation, and the *ERA* whistleblower provision expressly protects employee concerns about the Atomic Energy Act or regulations promulgated thereunder. Thus, the ARB found that Complainant's allegations might constitute protected activity under the *ERA* -- a close call, but sufficient to survive the very charitable standard applicable to 12(b)(6) motions.

[Nuclear & Environmental Digest XII D 1 b]

PROTECTED ACTIVITY; MUST IMPLICATE SAFETY DEFINITELY AND SPECIFICALLY

In *Makam v. Public Service Electric & Gas Co.*, ARB No. 99-045, ALJ No. 1998-ERA-22 (ARB Jan. 30, 2001), Complainant listed eleven activities he believed constituted protected activity relating to his actions in regard to a change in a Technical Specification that, because of a new method for calculation of the containment dome's average temperature, resulted in a situation that forced Respondent to take emergency measures to avoid a shutdown. The ARB held:

To constitute protected activity under the ERA, an employee's acts must implicate safety definitively and specifically. *American Nuclear Resources v. U.S. Department of Labor*, 134 F.3d 1292 (6th Cir. 1998). Makam never expressed to PSE&G officials a concern that the arithmetic method of calculating containment temperature was less "safe" than the volume weighted method that he endorsed. In fact, Makam has not proved that any of his actions were motivated by a belief that PSE&G was violating any nuclear laws or regulations, ignoring safety procedures, or assuming unacceptable risks. As the ALJ found, "it cannot be determined from Complainant's testimony which method he himself advocated, and which method, if any, he believed would constitute a safety concern if implemented." 1998 ERA 22 and 26 @ 7. Thus, we cannot conclude that any of Makam's actions implicated safety definitively and specifically.

The ERA does not protect every incidental inquiry or superficial suggestion that somehow, in some way, may possibly implicate a safety concern. *American Nuclear Resources, supra*, citing *Stone & Webster Eng'g Corp. v. Herman*, 115 F.3d 1568, 1574 (11th Cir. 1997). Whistleblower provisions such as the ERA's are intended to promote a working environment in which employees are free from the debilitating threat of employment reprisals for asserting company violations of statutes protecting nuclear safety and the environment. They are not, however, intended to be used by employees to shield themselves from termination actions for non-discriminatory reasons. *See Trimmer, supra*. In our view, Makam has not shown any nexus between his actions and some identifiable safety concern. Consequently, Makam's conduct falls outside the scope of ERA protection, and we concur with the ALJ that the complaint should be denied.

### **XIII. Adverse action**

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[Nuclear & Environmental Digest XIII A]

#### **ADVERSE EMPLOYMENT ACTION; REQUIREMENT OF TANGIBLE JOB CONSEQUENCE**

In *Shelton v. Oak Ridge National Laboratories*, ARB No. 98-100, ALJ No. 1995-CAA-19 (ARB Mar. 30, 2001), the ALJ found that an "Oral Reminder" directing Complainant to refrain from using abusive and profane language constituted an adverse employment action, relying on *Helmstetter v. Pacific Gas & Electric*, 1986-SWD-2 (Sec'y Sept. 9, 1992). Respondent urged the ARB to reconsider *Helmstetter* in light of recent Title VII caselaw to the effect that an act must have a tangible job consequence to be considered an adverse action. The ARB cited *Oest v. Illinois Dep't of Corrections*, 2001 WL 12111 (7th Cir. 2001), noting that the court in that case "specifically rejected the view that a reprimand can be considered adverse simply because each

reprimand may bring an employee closer to termination." In the case *sub judice* the ALJ found that an Oral Reminder is the lowest step of formal discipline; it is memorialized in a memo that is placed in the employee's personnel file for six months; once removed, it cannot be considered in any future disciplinary action. The ARB held that it was persuaded that, "in the absence of any showing that some tangible job consequence flowed from it, the 'Oral Reminder' issued to Shelton is not an adverse action. To the extent that *Helmstetter* would require a different result, we depart from it."

[Nuclear & Environmental Digest XIII B 8]

#### REFUSAL TO HIRE; KNOWLEDGE OF COMPLAINANT'S STATUS AS A WHISTLEBLOWER

In *Hasan v. Florida Power and Light Co.*, ARB No. 01-004, ALJ No. 2000-ERA-12 (ARB May 17, 2001), Complainant alleged that he had been discriminated against in violation of the whistleblower provision of the ERA when Respondent did not offer him a job after he applied for a position as a civil/structural/pipe support engineer. Complainant had applied for a job in September 1999; on November 6, 1999 he wrote to Respondent and essentially announced that he had a history of whistleblowing; when he did not receive a favorable reply by November 19, 1999, he filed a complaint with OSHA. Before the ALJ, Respondent filed a motion to dismiss based on the failure of Complainant to assert that Respondent knew of Complainant's whistleblower history when he decided not to hire him. In response, Complainant asserted that Respondent's counsel had been representing Respondent for years, and that his name appears on the Internet in connection with prior whistleblower lawsuits. The ARB interpreted Complainant's response as an allegation that the employees responsible for making hiring decisions learned of his protected activity either from Respondent's counsel or from reading decisions in previous cases published on the DOL Office of Administrative Law Judges' web site.

The ARB found that Complainant's mere speculation that Respondent's counsel informed hiring officials of Complainant's protected activity, or they learned it themselves by reading decisions posted on the DOL web site, was insufficient to establish a *prima facie* case. Complainant complained that he was not permitted discovery to establish facts in support of his claim. The ARB, however, stated that a complainant "cannot simply 'file a conclusory complaint not well-grounded in fact, conduct a fishing expedition for discovery, and only then amend his complaint in order to finally set forth well-pleaded allegations.'" Slip op. at 4, quoting *Hasan v. Commonwealth Edison Co.*, ARB No. 00-028, ALJ No. 2000-ERA-1 (ARB Dec. 29, 2000).

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To the same effect: *Hasan v. Commonwealth Edison Co.*, ARB No. 01-002, ALJ No. 2000-ERA-8 (ARB Apr. 23, 2001) (Complainant who does nothing more than submit his resume to Respondents and then allege that Respondents have discriminated against him because he

remains unemployed has not supported a claim of discrimination under the ERA; a complaint that fails to allege a *prima facie* case is subject to immediate dismissal).

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In *Hasan v. Burns & Roe Enterprises, Inc.*, ARB No. 00-080, ALJ No. 2000-ERA-6 (ARB Jan. 30, 2001), Respondent produced on motion for summary decision the affidavit of the official who received Complainant's resume and determined that he was not interested in hiring him. The official averred that his decision not to hire was made based on the original submission and before Respondent's receipt of a second letter from Complainant indicating that Complainant had engaged in whistleblowing activity. The official also averred that he never saw the second letter and knew nothing more about Complainant than what was disclosed in the earlier resume and cover letter. Moreover, the official averred that he decided not to hire Complainant based on his lacking a required professional engineer license and because the company had not needed engineers with nuclear experience since 1986. The ARB found that this affidavit indicated that two threshold elements of a *prima facie* case were lacking: hiring official's knowledge of applicant's prior whistleblowing activity, and retaliatory motive. Complainant responded with his own affidavit speculating as to the reasons he was not hired, which the ARB held was insufficient to overcome Respondent's motion for summary decision.

[Nuclear & Environmental Digest XIII B 8]

#### REFUSAL TO HIRE; FAILURE TO ALLEGE THAT POSITION REMAINED OPEN AFTER REJECTION

In *Hasan v. Florida Power and Light Co.*, ARB No. 01-004, ALJ No. 2000-ERA-12 (ARB May 17, 2001), Complainant alleged that he had been discriminated against in violation of the whistleblower provision of the ERA when Respondent did not offer him a job after he applied for a position as a civil/structural/pipe support engineer. The ARB recited four factors that must be considered in determining whether a refusal to hire constitutes an adverse action:

- 1) that the complainant applied and qualified for a job for which the employer was seeking applicants; 2) that, despite the complainant's qualifications, he or she was rejected; and 3) that after his or her rejection, the position remained open.

In the instant case, Complainant failed to allege the third factor, and therefore failed to establish a *prima facie* case.

[Nuclear & Environmental Digest XIII B 14]

#### ADVERSE ACTION; DRAFT STANDARDS OF CONDUCT

In *Moore v. U.S. Dept. of Energy*, ARB No. 00-038, ALJ No. 1999-CAA-15 (ARB Jan. 30, 2001), Complainant argued that draft standards of conduct for the Transportation Safeguards Division (TSD) of DOE's Albuquerque Operations Office were issued to retaliate against him for filing prior whistleblower complaints and had a chilling effect on TSD employees' exercise of their whistleblower rights. The ARB, however, found that mere circulation of a draft set of standards of conduct for the express purpose of eliciting comment from TSD employees, on which employees did comment, and which were never finalized because of the negative comments, did not constitute adverse action. In fact, the ARB found the complaint to be frivolous and wholly lacking in merit.

[Nuclear & Environmental Digest XIII B 16]

#### ADVERSE EMPLOYMENT ACTION; NOTICE OF AT-RISK STATUS AND SIMULTANEOUS OFFER FOR NOMINALLY PERMANENT POSITION

Where, shortly after Complainant raised safety issues that could have significantly delayed the opening of Respondent's nuclear facility, Complainant was notified of a transfer to "at-risk" Services, and given the opportunity to apply for a nominally permanent position in "Services" (a neophyte and ultimately short-lived organization for marketing the services of at-risk employees), the ARB found that these actions constituted adverse employment action. *Overall v. Tennessee Valley Authority*, ARB No. 98-111, ALJ No. 1997-ERA-53 (ARB Apr. 30, 2001),

### **XIV. Employer/employee**

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[Nuclear & Environmental Digest XIV B 2]

"JOINT EMPLOYER"; CONTRACT THAT GIVES FEDERAL AGENCY AUTHORITY TO REGULATE WORKERS AT GOVERNMENT OWED FACILITY DOES NOT IMPOSE JOINT EMPLOYER STATUS *PER SE*; FOCUS IS ON WHETHER AGENCY *ACTED* IN CAPACITY OF EMPLOYER

In *Williams v. Lockheed Martin Energy Systems, Inc.*, ARB No. 98-059, ALJ No. 1995-CAA-10 (ARB Jan. 31, 2001), the ARB affirmed the ALJ's dismissal under Fed. R. Civ. P. 12(b)(1) where Respondent Department of Energy – which had a contract with Lockheed Martin Energy Systems (LMES) to operate U.S. government owned nuclear facilities at Oak Ridge, Tennessee -- presented affidavits and a contract in support of its motion to dismiss on the theory that it did not have an employer-employee relationship with Complainant, and where Complainant failed to support his position with countervailing documents or affidavits. One member dissented on this issue, concluding that the ALJ had misapplied the law on what constitutes a common law employee to the question of whether DOE had been properly named as a respondent.

The majority of the Board, however, strongly disagreed with the dissenter. Citing the Board decision in *Stephenson v. NASA*, ARB Case No. 98-025, ALJ Case No. 1994-TSC-5 (July 18, 2000), the Board emphasized that "in a hierarchical employment context, an employer that *acts* in the capacity of employer with regard to a particular employee may be subject to liability under the environmental whistleblower provisions, notwithstanding the fact that employer does not directly compensate or immediately supervise the employee . . . ." The majority found that even though a federal agency may retain some authority to exercise control over a contractor's work product and to regulate the conduct of workers at government owned facilities, that fact does not mean *per se* that the federal agency becomes a joint employer with its contractors. The majority wrote that "[t]he question whether a federal agency actually has "acted" in the capacity of an "employer" with regard to a contractor's employees must be an individualized, fact-specific inquiry addressed on a case-by-case basis; liability (or even potential liability) cannot be imputed merely from the language of procurement contracts."

[Nuclear & Environmental Digest XIV B 4 j]

#### INDIVIDUALS NAMED AS RESPONDENTS

In *Williams v. Lockheed Martin Energy Systems, Inc.*, ARB No. 98-059, ALJ No. 1995-CAA-10 (ARB Jan. 31, 2001), one member of the Board found in a dissent that the ALJ should not have summarily dismissed two individuals named as Respondents. The dissenter noted that individual liability was not supported under the TSCA and the CAA -- which prohibit "employers" from discriminating against whistleblowers --but that under the CERCLA and SWDA individual liability is a possibility because those statutes provide that no "person" shall discriminate against whistleblowers. The two other ARB members, however, declined to reach this issue as it was not raised by Complainant on appeal.

## **XVI. Damages and remedies**

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[Nuclear & Environmental Digest XVI B 1]

#### REINSTATEMENT; INCLUSION OF NEEDED TRAINING FOR RE-ASSIMILATION

In the order of reinstatement in *Hobby v. Georgia Power Co.*, ARB No. 98-166, ALJ No. 1990-ERA-30 (ARB Feb. 9, 2001), the ARB also required Respondent to provide any training needed to re-assimilate Complainant into the company.

[Nuclear & Environmental Digest XVI B1]

#### REINSTATEMENT; LEVEL AT WHICH REINSTATEMENT SHOULD OCCUR; COMPLAINANT'S BURDEN OF PROOF

In *Hobby v. Georgia Power Co.*, ARB No. 98-166, ALJ No. 1990-ERA-30 (ARB Feb. 9, 2001), Complainant argued that he should be reinstated at a higher level based on his prior history of promotions and a tracking of other executive's careers. The ARB held that it is Complainant's burden to prove that his reinstatement should be at a level higher than he occupied when he was terminated, and that a "likelihood of promotion" is the primary test – a standard that involves demonstrating a predictable career path or career ladder. The Board found that Complainant's **"historical" approach** did not have the more particularized proof that is required. The assumption cannot be made that all "rising stars" in the executive suites will continue to ascend the corporate ladder – rather there must be specific evidence that the complainant himself or herself would have been likely to achieve particular higher-level positions.

The ARB found solid precedent in support of the **job tracking method**, but found that even under this approach a court must be able to conclude that the plaintiff would have achieved the positions of the employees chosen as comparators or closely similar positions. The ARB found that Complainant had not shown that the persons he sought to compare were appropriate for comparison.

[Nuclear & Environmental Digest XVI B 4]

#### REINSTATEMENT V. FRONT PAY

In *Hobby v. Georgia Power Co.*, ARB No. 98-166, ALJ No. 1990-ERA-30 (ARB Feb. 9, 2001), the ARB detailed the reasons why reinstatement is the presumptive remedy in wrongful discharge cases, but acknowledged that certain circumstances dictate alternative remedies such as front pay. Respondent presented three arguments why reinstatement was not appropriate:

- (1) Complainant should not be reinstated to a senior management position because he lacked the skills needed to perform such work and because other corporate executives therefore would not have confidence in his abilities;

The ARB observed that the record plainly showed that Complainant demonstrated a high level of competence and trustworthiness over a period of years with Respondent, and was generally held in high regard prior to his termination. In finding that Complainant's long absence from the corporate suites was not sufficient reason not to order reinstatement, the ARB quoted with approval the ALJ's observation that "Respondent terminated Complainant because of protected activity, and now seeks to benefit from the fruits of its act of wrong doing."

- (2) Other managers would not view Complainant as trustworthy after having litigated a whistleblower complaint against the company;

The ARB found that the frictions and inconveniences cited by Respondent were insufficient reason to deny reinstatement.

- (3) There is no longer a comparable position within the company to which Complainant can be reinstated.

Although the division that Complainant headed at the time of his termination was disbanded and absorbed into other parts of the company, and the ARB declined to order Respondent to re-institute the division or an equivalent entity, it also found that Respondent and Complainant were both too limited in their approach to the range of positions to which Complainant might be reinstated. The ARB held: "Stated simply, the reinstatement language of the ERA whistleblower protection section does not require that a prevailing complainant be reinstated to the precise position formerly occupied, only to a comparable position; to view the statutory text otherwise would allow an employer to evade reinstatement merely by abolishing or reconfiguring the particular position that a discharged complainant had occupied."

[Nuclear & Environmental Digest XVI C 2 b v]

#### MITIGATION OF DAMAGES

A respondent bears the burden of proving that the complainant did not properly mitigate damages. To meet this burden, the respondent must show that (1) there were substantially equivalent positions available; and (2) the complainant failed to use reasonable diligence in seeking these positions. The benefit of a doubt ordinarily goes to the complainant.

In *Hobby v. Georgia Power Co.*, ARB No. 98-166, ALJ No. 1990-ERA-30 (ARB Feb. 9, 2001), Respondent presented a study of employment opportunities, and Complainant presented several witnesses to counter employer's study. The ARB agreed with the ALJ's findings that Respondent could not meet its burden merely by pointing out that Complainant did not apply to every available employer. The ARB agreed with the ALJ that Respondent's study's premise that whistleblowing activity would be considered a positive trait in job applicants was incredible, and therefore cast doubt on the value of the researcher's research and testimony.

The ARB declined to follow Title VII authority indicating that if an employer proves that the employee has not made reasonable efforts to obtain work, it is not necessary for the employer to also establish the availability of substantially comparable work, distinguishing those cases on the ground that Title VII is designed primarily to vindicate private rights rather than promote the public health and safety enforcement goal of the ERA whistleblower provisions, and noting that one legal scholar has questioned this alternative approach for proving a failure to mitigate

damages.

In regard to whether Complainant used reasonable diligence, the ARB thoroughly reviewed Complainant's job search efforts, noting that Complainant had sought enforcement of the Secretary's 1995 merits decision in federal court, and found that this was not a case where the complainant abandoned his connection to the job market. The ARB noted that Complainant's job search had been considerably complicated by his abrupt termination from a senior position.

[Nuclear & Environmental Digest XVI C 2 b v]

MITIGATION; WHEN A COMPLAINANT MUST "LOWER HIS OR HER SIGHTS"

In *Hobby v. Georgia Power Co.*, ARB No. 98-166, ALJ No. 1990-ERA-30 (ARB Feb. 9, 2001), Respondent argued that back pay should be reduced because Complainant waited too long to "lower his sights" and seek positions outside the nuclear power industry. The ARB noted that a complainant who is unsuccessful in his or her search for an equivalent job must eventually seek employment in another field, but that where Complainant had spent many years working his way "up the ladder" into senior corporate management positions, he could not have been expected precipitously to "go into another line of work, accept a demotion, or take a demeaning position." Thus, in the case *sub judice* it was perfectly reasonable for Complainant to keep searching for an equivalent for an extended period.

[Nuclear & Environmental Digest XVI C 2 c i]

BACK WAGES; OFFSET FOR INTERIM EARNINGS; CREDIT DURING QUARTER  
EARNED FOR PURPOSES OF COMPUTATION OF INTEREST

In *Hobby v. Georgia Power Co.*, ARB No. 98-166, ALJ No. 1990-ERA-30 (ARB Feb. 9, 2001), the ARB held that "[f]or purposes of computing and compounding interest, all interim earnings shall be credited against Georgia Power's gross back pay obligation during the quarter in which the interim earnings were earned." Slip op. at 42 (footnote omitted).

[Nuclear & Environmental Digest XVI C 2 c vi]

DAMAGES; TAX PENALTY FOR EARLY DISTRIBUTION OF IRA ACCOUNT

In *Hobby v. Georgia Power Co.*, ARB No. 98-166, ALJ No. 1990-ERA-30 (ARB Feb. 9, 2001), Respondent was required to reimburse Complainant for tax penalties resulting from early distribution of Complainant's stock and IRA account, plus interest.

[Nuclear & Environmental Digest XVI C 2 d]

BACK WAGES; OFFSET INCLUDES OVERTIME

In *Hobby v. Georgia Power Co.*, ARB No. 98-166, ALJ No. 1990-ERA-30 (ARB Feb. 9, 2001), the ARB rejected Complainant's argument that work performed for a second company after regular working hours for his primary employer should be excluded from the back pay offset calculation. The Board held that "[b]ecause these monies were nevertheless 'interim earnings,' we include this amount in the interim earnings calculation."

[Nuclear & Environmental Digest XVI C 3]

DAMAGES; LOST VACATION TIME; RESTORATION V. CASH VALUE

In *Hobby v. Georgia Power Co.*, ARB No. 98-166, ALJ No. 1990-ERA-30 (ARB Feb. 9, 2001), the ARB adopted the standard of *Palmer v. Western Truck Manpower, Inc.*, 1985-STA-16 (Sec'y June 26, 1990), *vac'd on other grounds*, *Western Truck Manpower, Inc. v. United States Dep't of Labor*, 943 F.2d 56 (9th Cir. 1991) (table), available at 1991 U.S. App. LEXIS 21675, for determining when a complainant is entitled to reimbursement for lost vacation time. A complainant is entitled to be paid for accrued vacation time he has lost as a result of the employer's discrimination; however, "[w]here it is the practice of the employer to pay an employee for vacation time not taken, it is equitable that a complainant receive both straight wages and vacation pay for the same period. Where, however, an employee must take his vacation or lose it, the addition of vacation pay to a back pay award of straight salary for the same period would compensate the complainant for more than he lost as a result of the employer's illegal discrimination." *Hobby*, slip op. at 36, quoting *Palmer, supra.*, slip op. at 4-5.

Finding that Complainant's former employer permitted "carry-over" of unused leave, the ARB found that Complainant was entitled to the cash value of lost vacation until the time he is reinstated, plus interest. In making this ruling, the ARB in effect affirmed the ALJ's rejection of Complainant's request for the restoration of lost vacation time instead of the cash value of such time. The ALJ had found that restoration of lost vacation time was not consistent with the goal of reintegrating Complainant into Respondent's organization.

[Nuclear & Environmental Digest XVI D 4 a]

COMPENSATORY DAMAGES; SIZE OF AWARD

In *Hobby v. Georgia Power Co.*, ARB No. 98-166, ALJ No. 1990-ERA-30 (ARB Feb. 9, 2001), the ARB adopted the ALJ's award of compensatory damages in the amount of \$250,000. Respondent argued that the ALJ's award of compensatory damages was excessive in light of the

fact that Hobby presented no expert medical or psychiatric testimony. The ARB, however, found that "[c]ompensatory damages are designed to compensate discriminatees not only for direct pecuniary loss, but also for such harms as impairment of reputation, personal humiliation, and mental anguish and suffering." Respondent also argued that the award was excessive in light of previous DOL whistleblower cases. The ARB noted that the award was comparatively high, but noted its decision in *Leveille v. New York Air Nat'l Guard*, ARB No. 98-079, ALJ Nos. 94-TSC-3, 4 (ARB Oct. 25, 1999), it had held that there is no arbitrary upper limit in compensatory damages award and that damage awards in other discrimination-related statutes can be instructive (noting that in Title VII cases, awards up to \$300,000 for non-pecuniary losses are allowed). The ARB summarized as follows:

During his final days at Georgia Power, Hobby was subjected to a series of slights by the company -- being moved to a much smaller office, having his building access restricted, and being ordered to turn in his employee badge and his gate opener to the executive parking garage. By themselves, these incidents probably would merit only a small award of compensatory damages. But these small events were the precursor of more serious problems to come as Hobby experienced continuing difficulty finding work in his chosen profession, and experienced emotional distress tied to his depleted finances, repeated requests of friends and family for money, and the obligation to inform those responsible for his professional development that he had been fired from his job with Georgia Power. In terminating Hobby's employment because of his internal complaints, Georgia Power severely damaged Hobby's reputation. It is clear from the record that Hobby's career had been very promising up until his termination; afterward, that career was largely gone. In this context, we find the ALJ's recommended award of \$250,000 compensatory damages to be reasonable, and therefore adopt it.

Slip op. at 35 (footnote omitted).

[Nuclear & Environmental Digest XVI E 3 a]

ATTORNEY FEES; LACK OF SPECIFICITY OF ENTRIES; PERCENTAGE REDUCTION IN AWARD

In *Graf v. Wackenhut Services L.L.C.*, 1998-ERA-37 (ALJ Feb. 6, 2001), the ALJ found that entries in a fee petition such as "review documents," "depositions", "trial preparation," and "strategizing" did not provide a meaningful opportunity for review of the reasonableness or necessity of the fees charged. The ALJ also found that where the billing descriptions do not afford a meaningful opportunity to determine the reasonableness of the time expenditures, an ALJ need not engage in an item by item reduction of the hours. Rather, in such circumstances it

is permissible to make reductions based upon a percentage basis. Although appeals were taken from the ALJ's recommended decision, the parties settled on appeal, and the ARB did not review this ruling. *See Graf v. Wackenhut Services, L.L.C.*, ARB No. 01-041, ALJ No. 1998-ERA-37 (ARB Mar. 30, 2001).

[Nuclear & Environmental Digest XVI E 3 c]

#### HOURLY RATE; WHETHER TO SET BASED ON HEARING LOCATION OR LOCATION OF ATTORNEY'S OFFICE

In *Graf v. Wackenhut Services L.L.C.*, 1998-ERA-37 (ALJ Feb. 6, 2001), Complainant billed at the hourly rate for the location of his attorneys' office in Seattle, Washington rather than for Colorado where the hearing took place. The ALJ noted that hourly rates are normally based on the locality of the hearing, but found that the specialized nature of the case and the unavailability of local counsel were grounds for exception to that rule, citing *National Wildlife Federation v. Hanson*, 859 F.2d 313 (4th Cir. 1988). Although appeals were taken from the ALJ's recommended decision, the parties settled on appeal, and the ARB did not review this ruling. *See Graf v. Wackenhut Services, L.L.C.*, ARB No. 01-041, ALJ No. 1998-ERA-37 (ARB Mar. 30, 2001).

[Nuclear & Environmental Digest XVI E 3 d i]

#### ATTORNEY FEES; REDUCTION BASED ON LIMITED SUCCESS

In *Graf v. Wackenhut Services L.L.C.*, 1998-ERA-37 (ALJ Feb. 6, 2001), the ALJ recommended reducing the lodestar by 30% based on Complainant's partial success in the litigation where the original ALJ who presiding over the case found that only one of three alleged instances of retaliation stated a meritorious ERA whistleblower complaint. Although appeals were taken from the ALJ's recommended decision, the parties settled on appeal, and the ARB did not review this ruling. *See Graf v. Wackenhut Services, L.L.C.*, ARB No. 01-041, ALJ No. 1998-ERA-37 (ARB Mar. 30, 2001).

[Nuclear & Environmental Digest XVI E 3 d v]

#### ATTORNEY FEES; REDUCTION BASED ON BILLING JUDGMENT

In *Graf v. Wackenhut Services L.L.C.*, 1998-ERA-37 (ALJ Feb. 6, 2001), the ALJ recommended reducing the lodestar by 5% based "billing judgment" -- the notion that some items billed would not have been charged a private client. Although appeals were taken from the ALJ's recommended decision, the parties settled on appeal, and the ARB did not review this ruling. *See Graf v. Wackenhut Services, L.L.C.*, ARB No. 01-041, ALJ No. 1998-ERA-37

(ARB Mar. 30, 2001).

[Nuclear & Environmental Digest XVI E 4 a]

COSTS; FEE PETITION TO ALJ

In *Hobby v. Georgia Power Co.*, ARB No. 98-166, ALJ No. 1990-ERA-30 (ARB Feb. 9, 2001), Respondent was required to pay Complainant's attorney fees and costs associated with the litigation, including costs in attending the hearing (e.g., transportation, lodging, meals). The ARB directed the fee petition to be presented to the presiding ALJ.

## **XVII. Settlements**

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[Nuclear & Environmental Digest XVII A]

SETTLEMENTS; SWDA DOES NOT REQUIRE DOL APPROVAL

The SWDA does not require the Secretary to approve a settlement. *Jones v. EG&G Defense Materials, Inc.*, ARB No. 01-039, ALJ No. 1995-CAA-3 (ARB Mar. 13, 2001).

[Nuclear & Environmental Digest XVII A]

SETTLEMENTS; CAA AND TSCA MUST BE APPROVED BY DOL

The CAA and the TSCA require the Secretary of Labor to enter into or otherwise approve a settlement. See 42 U.S.C. §7622(b)(2)(A) (CAA); 15 U.S.C. §2622(b)(2)(A) (TSCA). *Jones v. EG&G Defense Materials, Inc.*, ARB No. 01-039, ALJ No. 1995-CAA-3 (ARB Mar. 13, 2001).

[Nuclear & Environmental Digest XVII A]

SETTLEMENTS; AUTHORITY OF ARB TO APPROVE

The Secretary has delegated to the ARB her authority to approve settlements of cases that are pending before the Board at the time the parties enter into the settlement. Secretary's Order 2-96, 61 Fed. Reg. 19978 (May 3, 1996); 29 C.F.R. §24.8. *Jones v. EG&G Defense Materials, Inc.*, ARB No. 01-039, ALJ No. 1995-CAA-3 (ARB Mar. 13, 2001).

[Nuclear & Environmental Digest XVII G 4]

## ENFORCEMENT OF SETTLEMENT AGREEMENT; JURISDICTION OF ALJ AND ARB

In *Thompson v. Houston Lighting & Power Co.*, ARB No. 98-101, ALJ No. 1996-ERA-34 (ARB Mar. 30, 2001), Complainant asserted before the ALJ that the Department has inherent jurisdiction to enforce settlements approved by the Secretary. The ALJ declined to adopt Complainant's assertion, finding that enforcement was beyond his jurisdiction. On review, the ARB noted that subsequent to the ALJ's ruling, the Third Circuit held in an unrelated case that the Secretary lacked authority to enforce a settlement agreement because, under the ERA, enforcement authority is vested exclusively in the U.S. district courts. *Williams v. Metzler*, 132 F.3d 937 (3d Cir. 1997).

Complainant argued that although *Williams* is binding on cases arising in the Third Circuit, it is not binding on cases arising in the Fifth Circuit, and inasmuch as his case arose in the Fifth Circuit, the ARB should follow *Orr v. Brown & Root, Inc.*, 1985-ERA-6 (Sec'y Oct. 2, 1985), a case in which the Secretary found that the Department does have jurisdiction to enforce a settlement agreement. The Board noted that the *Orr* decision was based on a Sixth Circuit decision that was expressly rejected by the Fifth Circuit, and held that:

In our view, the ERA makes it unequivocally clear that a settlement agreement is enforceable only through U.S. District Court. 42 U.S.C. §5851(e). Thus, we agree with the Third Circuit that the Department has no authority, either express or implied, to enforce a settlement agreement in an ERA case.

The Board, however, left open the possibility for enforcement in whistleblower cases other than ERA, noting the decision in *Chase v. Buncombe County*, 1985-SWD-4 (Sec'y Nov. 3, 1986), which arose under the SWDA, and which does not contain a provision placing enforcement authority in the U.S. District Courts.

Complaint also requested that the Secretary initiate or join an enforcement action. The ARB declined to address this request as DOL regulations do not confer on the Board any role in the enforcement process.

## **XVIII. Dismissals**

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[Nuclear & Environmental Digest XVIII C 8]

DISMISSAL; FAILURE TO PROSECUTE

In *Williams v. Lockheed Martin Energy Systems, Inc.*, ARB No. 98-059, ALJ No. 1995-CAA-10 (ARB Jan. 31, 2001), the ARB affirmed the ALJ's dismissal where Complainant failed to respond to a motion for summary decision with documents or affidavits that countered the movant's documentation and affidavit. One member of the Board wrote a concurrence, however, to note that the ALJ had given Complainant extraordinary latitude in responding to the motion for summary decision, providing Complainant with over 18 months to answer the motion, and even "one last chance." Although the ARB member commended the ALJ's patience, he observed that such repeated failures to file pleadings could be viewed as a failure to prosecute, and stated that the ALJ would have been justified in dismissing the case on that ground.

## **XX. Relationship between 29 C.F.R. Part 24 and other laws**

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[Nuclear & Environmental Digest XX A]

### **WHISTLEBLOWER PROVISIONS DO NOT PRECLUDE FIRST AMENDMENT SUIT**

The court in *Charvat v. Eastern Ohio Regional Wastewater Authority*, 246 F.3d 607, 2001 WL 336462 (6th Cir. Apr. 9, 2001) (relates to 1996-ERA-37), held that the whistleblower provisions of the Clean Water Act, 33 USC § 1367(a) and the Safe Drinking Water Act, 42 USC § 300j-9(i), do not preclude a complainant from bringing a suit under 42 USC § 1983 for alleged retaliation in violation of protected First Amendment rights.

[Nuclear & Environmental Digest XX E]

### **SOVEREIGN IMMUNITY; DEPARTMENT OF ENERGY**

In *High v. Lockheed Martin Energy Systems, Inc.*, ARB No. 98-075, ALJ No. 1996-CAA-8 (ARB Mar. 13, 2001), a complaint under the ERA whistleblower provision was dismissed on sovereign immunity grounds as to the United States Department of Energy and its Oak Ridge Operations Office.

[Nuclear & Environmental Digest XX E]

### **SOVEREIGN IMMUNITY; ARB RAISES ISSUE *SUA SPONTE***

In *Pastor v. Veterans Affairs Medical Center*, ARB No. 99-071, 1999-ERA-11 (ARB Mar. 1, 2001), the case was before the ARB based on the ALJ's recommendation of dismissal based on Complainant's failure to file a timely complaint. In an Order Directing Additional Briefing, the ARB noted that Respondent is an agency of the federal government, and that sovereign immunity has not been waived under the ERA whistleblower provision. Even though Respondent had not

raised the issue, the ARB found that sovereign immunity is jurisdictional in nature, and therefore appropriate for the ARB to raise *sua sponte*. Thus, the ARB ordered the parties to brief the issue.

[Nuclear & Environmental Digest XX E]

#### STATE SOVEREIGN IMMUNITY; ELEVENTH AMENDMENT

In *State of Connecticut Dept. of Environmental Protection v. OSHA*, \_\_ F.Supp. \_\_, 2001 WL 456234, No. 3-99CV2291 GLG (D.Conn. Apr. 23, 2001), the court found that state sovereign immunity barred federal administrative investigation and adjudicatory proceedings under the whistleblower provisions of the CAA, SDWA and SWDA. The court therefore enjoined OSHA from proceeding with the *investigation, adjudication and prosecution* of the complaint.

In *State of Florida v. United States*, 133 F.Supp.3d 1280 (N.D. Fla. Mar. 2, 2001) (case below 2000-CAA-19), the court held that "state constitutional sovereign immunity bars the commencement and prosecution of a federal administrative proceeding by a private individual against a state, to the same extent as would be true with respect to a private individual's lawsuit in federal or state court." The court concluded that Complainant's whistleblower complaint against the State of Florida was the functional equivalent of an action commenced and prosecuted by Complainant individually, rather than by the Department of Labor, and therefore barred. The court found no clear intention by Congress to abrogate state sovereign immunity in regard to the type of whistleblower complaint brought by Complainant (where he commenced and prosecuted the administrative complaint after DOL had found the complaint unfounded). Finally, the court observed that the 11th Amendment and state sovereign immunity would not bar an administrative proceeding from going forward to the extent that it seeks prospective relief as against individual state officials in their official capacities, or to the extent that it seeks relief against those persons in their individual capacities (the court, however, did not rule on whether such suits were cognizable against individuals under the CAA, WPCA, TSCA, SDWA, SWDA and CERCLA). The court concluded, however, Complainant's suit against individual state officials would be barred to the extent that he seeks damages or other retrospective relief, but not to the extent that they seek prospective relief.

See also *South Carolina State Ports Authority v. Federal Maritime Commission*, No. 00-1481 (4th Cir. Mar. 12, 2001) (state sovereign immunity protects state from being brought before the Federal Maritime Commission by a private party).

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## SURFACE TRANSPORTATION ASSISTANCE ACT WHISTLEBLOWER DECISIONS

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### II. Procedure

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[STAA Digest II B 2 d ii]

TIMELINESS OF COMPLAINT; FAILURE OF EMPLOYER TO POST STAA WHISTLEBLOWER PROVISION OR TO MENTION IT IN THE DRIVER'S MANUAL

An employer's failure to post the STAA whistleblower provisions "does not amount to the kind of *active* misrepresentation that is required to invoke equitable tolling" of the period for filing a STAA complaint. Moreover, the fact that the STAA is not mentioned in the employer's driver's manual does not excuse a complainant's late filing. *Tierney v. Sun-Re Cheese, Inc.*, ARB No. 00-052, ALJ No. 2000-STA-12 (ARB Mar. 22, 2001).

[STAA Digest II B 2 d ii]

TIMELINESS OF COMPLAINT; WRONG FORUM

In *Tierney v. Sun-Re Cheese, Inc.*, ARB No. 00-052, ALJ No. 2000-STA-12 (ARB Mar. 22, 2001), Complainant had filed a claim with the Pennsylvania Department of Labor and Industry, and contacted the Pennsylvania Human Relations Commission. This claim was filed within the 180-day STAA whistleblower filing period. The ARB found nothing in Complainant's pleadings or testimony, however, to demonstrate that he "'raised the precise statutory claim in issue' [before these agencies] -- *i.e.*, a complaint that he was discharged in retaliation for activity protected by the STAA whistleblower provision." Accordingly, Complainant's contacts with Pennsylvania agencies were found not to toll the running of the STAA limitations period.

[STAA Digest II J]

BRIEF BEFORE ARB; EQUITABLE FILING OUT OF TIME

In *More v. R&L Transfer, Inc.*, ARB No. 01-044, ALJ No. 2000-STA-23 (ARB Mar. 16, 2001), the ARB granted Complainant's motion to file a brief out of time, where Complainant, who was proceeding *pro se*, averred that he attempted to contact a number of DOL officials to determine

the procedures for filing a brief, but did not find out the schedule until he contacted the ARB.

[STAA Digest II J]

#### BRIEF BEFORE ARB; ENLARGEMENT OF TIME TO SOLICIT *AMICUS* BRIEFS DENIED

In *Stauffer v. Walmart Stores, Inc.*, ARB No. 00-062, ALJ No. 1999-STA-21 (ARB Feb. 21, 2001), the ARB denied Complainant's motion for an enlargement of time to solicit *amicus* briefs. The Board had granted permission for each party to file a brief responsive to the opening briefs because of the unusual circumstances of the case. The Board found the request to solicit *amicus* briefs beyond the scope of the order permitting the filing of responsive briefs.

### III. Weighing of evidence and interpretation of law, generally

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[STAA Digest III J]

#### RESPONDENT'S DECISION NOT TO CALL CERTAIN WITNESSES

In *Tierney v. Sun-Re Cheese, Inc.*, ARB No. 00-052, ALJ No. 2000-STA-12 (ARB Mar. 22, 2001), Complainant argued on appeal to the ARB that because Respondent did not call various witnesses, it failed to *disprove* that discrimination occurred. The ARB found that such an argument places the burden of proof on its head – it is the *complainant* who must prove that an adverse action occurred.

*But see Overall v. Tennessee Valley Authority*, ARB No. 98-111, ALJ No. 1997-ERA-53 (ARB Apr. 30, 2001) (Respondent's failure to produce a witness on issue of whether funding for Complainant's position existed, supported an adverse inference).

[STAA Digest III J]

#### EVIDENCE; CONFLICT OVER COMPLAINANT'S UNION ACTIVITIES

In *Ass't Sec'y & Helgren v. Minnesota Corn Processors*, 2000-STA-44 (ALJ Feb. 21, 2001), the ALJ permitted admission into the record evidence showing that contract negotiations and Complainant's union activities were a source of conflict between Complainant and an assistant terminal manager, over the strenuous objection of Respondent. The ALJ admitted the evidence because of its temporal proximity to the events leading to Complainant's termination, and because the ALJ determined that exclusion of this evidence would foreclose a complete and accurate understanding of the relationship between Complainant and Respondent's management

at the time of his termination.

The ALJ noted that in *Etchason v. Carry Companies of Illinois, Inc.*, 1992-STA-12 (Sec'y March 20, 1995), slip op. at 3 n.2., it was held that the ALJ did not err in giving no weight to evidence of respondent's misconduct in an entirely different case brought before the National Labor Relations Board, noting that 29 C.F.R. §18.404(b) provides that evidence of other wrongs is not admissible to prove character in order to show action in conformity therewith.

In the instant case, however, the ALJ viewed the incident which occurred between Complainant and his immediate supervisor a little over a month before his termination as not an entirely different case. The ALJ found that the incident provided, at a minimum, relevant background.

## **VI. Adverse action**

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[STAA Digest VI B 1]

### **ADVERSE EMPLOYMENT ACTION; HARASSMENT; CONSTRUCTIVE DISCHARGE**

It is not sufficient merely to allege that harassment occurred; rather, a complainant must prove by a preponderance of the evidence that he or she was harassed for engaging in protected activity. In *Tierney v. Sun-Re Cheese, Inc.*, ARB No. 00-052, ALJ No. 2000-STA-12 (ARB Mar. 22, 2001), Complainant had been granted permission to leave early if he completed his duties in a timely fashion. Complainant complained about the brakes on the first truck to which he had been assigned, and was assigned a second truck, which had to first be unloaded. The mere fact that his supervisor disagreed with Complainant about the status of the brakes after taking the first truck out for a test drive, and told Complainant that he was not working fast enough to unload the second assigned truck to permit him to leave early, did not establish harassment nor such oppressive working conditions that a reasonable person would believe it necessary to resign. The ARB noted, in fact, that when Complainant announced that he intended to quit, Respondent pleaded with him to stay.